

PETER MVEMVE
versus
NATIONAL RAILWAYS OF ZIMBABWE

HIGH COURT OF ZIMBABWE
MOYO J
BULAWAYO 30 JULY AND 1 OCTOBER 2015

Provisional Sentence

E Mlalazi for plaintiff
A Muchadehama for defendant

MOYO J: Plaintiff issued summons for provisional sentence suing defendant for a sum of \$21112-77 which plaintiff claims is the total due to him by defendant for salary arrears, cash in lieu of leave and refund of fees.

Plaintiff has attached as annexure 'A' a memorandum which he sent to the defendant which memorandum the defendant's Human Resources Manager inscribed in the long hand that the company was facing financial constraints and therefore unable to pay. He further goes on to state that the proposal on the salary arrears is accepted. He states that the proposal on the PIL and bonus is difficult to consider as these would be in the January 2015 advice which constitutes the 9th month of salary arrears. Plaintiff's lawyers on 16 March 2015 then sent a formal letter of demand to the defendant demanding a total of \$26959-10.

There is apparently a letter dated 23 March 2015, which the defendant addressed and sent to plaintiff but it is not annexed to the summons for provisional sentence. A further letter by defendant, which refers to defendant's letter dated 23 March 2015 was then sent to plaintiff on 24 April 2015. The letter dated 24 April proposes to liquidate all the indebtedness to plaintiff as shown in their records in substantial monthly instalments. The defendant has challenged the summons for provisional sentence on the basis that there is no liquid document among the attached documents upon which plaintiff could sustain a claim for provisional sentence.

I have had to import from South African authorities in a bid to make a finding as to whether there is a liquid document before me which can successfully sustain a claim for provisional sentence by the plaintiff as against the defendant.

In the case of *Ruth and others v Lagerwery* 1974 (4) SA 748 (AD) at 754 (A) the court said that if a document in question upon a proper construction thereof, evidences by its form and without resort to evidence' extrinsic thereto, an unconditional acknowledgement of indebtedness, in an ascertained amount of money, the payment of which is due to the creditor, it is one upon which provisional sentence may properly be granted. (emphasis mine).

I will quickly point out that I have not grasped from any of the documents filed by the plaintiff in support of its claim "an unconditional acknowledgment of indebtedness in an ascertained amount of money by the defendant written to the plaintiff."

In the case of *Union Share Urgency and Investment Ltd v Spain* 1928 AD 74 at 79 SOLOMON CJ had this to say

"It is of the essence of the doctrine of provisional sentence that the acknowledgment of debt or the undertaking to pay should be clear and certain on the face of the document itself and that no extrinsic evidence should be required to establish indebtedness".

Further in the case of *Inter-Union Finance Ltd v Franskraal Strand BPK* 1965 (4) SA 180 W at 181 W – G BOSHOFF J stated thus:

"Provisional sentence may only be granted on a liquid document which is a document wherein a debtor acknowledges over his signature or that of his duly authorized agent, or is in law regarded as having acknowledged without his signature actually having been affixed thereto, his indebtedness in a fixed and determinate sum of money. The amount of the debt must be ascertained and the document must be sufficient in itself and not require extrinsic evidence to prove that the debt is due." (Emphasis mine)

Clearly from these cases, the document must have a clear and unequivocal acknowledgment of debt by the defendant. The acknowledgment must be for a definite sum of money. The document must conclusively show that the defendant is acknowledging its indebtedness on a specified sum of money. None of the documents attached by the plaintiff pass this test in my view.

Firstly annexure 'A' by the human resources manager did not acknowledge any specified sum save to state that they were facing challenges and financial constraints and that the nine

months' salary arrears was accepted but the PIL (which I am not sure what it is) and the bonus are difficult as they would be computed into the 9th month's salary in January 2015.

The other annexure dated 24 April does not assist in any way for it refers to a letter dated 23 March 2015 which is not annexed to the summons. This letter also does not acknowledge indebtedness in a specified sum in fact it says in paragraph 1 thereof:

“Our Human Resources Manager responded accepting certain aspects of the proposal and counter offered modifications to others on account of capacity constraints”.

There is therefore no clear and unequivocal acknowledgment of a specified amount due to plaintiff by defendant in the letter dated 24 April 2015. I will not allude to the documents authored by plaintiff or his legal practitioners as obviously a document that would pass the test for provisional sentence should be authored by the defendant in clear and unequivocal terms of acknowledgment of a definite sum of money and such document should be conclusive without extrinsic evidence being obtained. In other words the document authored by the defendant should speak for itself and should not be read in context with extrinsic evidence in the form of other documents. It is my finding that plaintiff has not tendered to the court a clear and unequivocal acknowledgment of debt by the defendant for an ascertained sum of money.

Having found that the plaintiff's documents do not make a case for provisional sentence to be granted I then proceed to look at the rules in so far as the avenues open to this court in such a situation are concerned.

The court in terms of rule 34 can refuse provisional sentence and order that the case stand over for trial. In this case the matter in which the plaintiff sought provisional sentence is purely a labour matter and therefore this court cannot make an order to the effect that the matter stands over to trial for the simple reason that the jurisdiction to try such matters vests in the Labour Court.

Section 89 of the Labour Act [Chapter 28:01] provides that the Labour Court shall hear and determine all matters which are in terms of the Labour Act.

Plaintiff's issue is clearly a labour issue and it should be pursued in accordance with section 89 of the Labour Act.

It is for this reason that I will therefore not refer this matter to trial. Counsel for the defendant submitted that plaintiff should be made to pay costs at an attorney and client scale for

the simple reason that they forged ahead with a claim for provisional sentence when they were clearly aware that there is no liquid document in support of such cause. The defendant's counsel submitted that plaintiff's conduct amounted to abuse of court process, as plaintiff embarked on a cause that was clearly still born. Whilst plaintiff's counsel may have misread or misunderstood the whole concept of a liquid document as it relates to provisional sentence when this matter was initiated, one would have expected him to do a profound research in the area of the law after being served with the notice of opposition which sought to point out the inadequacies of the claim by plaintiff. To blindly forge ahead with a baseless claim in so far as the process of provisional sentence is concerned, smacks of an unwillingness to discern on the issues, take corrective action and avoid a waste on legal costs.

According to Herbstein et al, in the book;: *The Civil Practice of the Supreme Courts of South Africa*, 4th Edition at page 717, an award of attorney and client costs will not be granted lightly, as the court looks upon such orders with disfavor and is loathe to penalize a person who has exercised his rights to obtain a judicial decision in any complaint he may have.

At page 719 of the same book it is stated that attorney and client costs may be levied on the grounds of an abuse of the process of court, vexatious, unscrupulous, dilatory, or mendacious conduct on the part of the unsuccessful litigant, absence of *bona fides* in conducting litigation, unworthy, reprehensible and blameworthy conduct, an attitude towards the court that is deplorable and highly contemptuous of the court, conduct that smacks of petulance, and that is vexatious and abuse of the process of the court, the existence of a grave defect in the proceedings, as a mark of the court's disapproval of some conduct that should be frowned upon, and where the conduct of the attorney acting for a party is open to censure. Attorney and client costs have also been awarded where, *inter alia* proceedings have been brought over hastily on ill-advised grounds.

In my view plaintiff's conduct falls within the categories mentioned herein as I am of the considered view that provisional sentence proceedings were brought hastily and on ill-advised grounds. They therefore amount to an abuse of court process in my view.

It is for this reason that I will dismiss the summons for provisional sentence with costs at an attorney and client scale. I accordingly make the following order:

- 1) Plaintiff's claim for provisional sentence is hereby dismissed with costs at a higher scale.

- 2) Plaintiff is ordered to pursue his claim, if he so wishes within the ambit of the Labour Act [Chapter 28:01]

Messrs Dube-Banda, Nzarayapenga and Partners, plaintiff's legal practitioners
Mbidzo Muchadehama and Makoni, defendant's legal practitioners